Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

PAUL NAGY,

Petitioner,

v.

FMC BUTNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The *in forma pauperis* statute, 28 U.S.C. § 1915(e)(2)(B)(i), allows the courts to dismiss claims brought by indigent parties without prepayment of filing fees upon determining that their claims are "frivolous." The issues presented are:

1. Did the Court of Appeals impermissibly expand the Supreme Court's definition of "frivolous" by holding that courts may dismiss a claim brought under the *in forma pauperis* statute based on considerations aside from whether the claim "lacks an arguable basis either in law or in fact"?

2. Did the Court of Appeals, by creating a multifactor test that would allow courts wide-ranging discretion to dismiss legally valid *in forma pauperis* suits, impermissibly intrude upon Congress's detailed scheme, as set forth in the Prison Litigation Reform Act of 1995, allowing dismissal of only specified classes of suits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Mr. Nagy's Tort Claim	2
B. The District Court's Denial	2
C. The Court of Appeals' Decision	3
REASONS FOR GRANTING THE PETITION ...	5
I. The Court Of Appeals' Decision Presents An Important Question Because It Conflicts With The Supreme Court's Definition Of "Frivolous" Suits Under The *In Forma Pauperis* Statute	6

Contents

Page

II. The Court Of Appeals' Decision Presents An Important Question Because It Disturbs Congress's Detailed Statutory Scheme For Screening Prisoner Lawsuits Established By The Prison Litigation Reform Act 10

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

CASES

Crawford-El v. Britton,
523 U.S. 574 (1998) 10

Denton v. Hernandez,
504 U.S. 25 (1992) 6-7, 9

Deutsch v. United States,
67 F.3d 1080 (1995) 5

Johnson v. Daley,
339 F.3d 582 (7th Cir. 2003) 10

Neitzke v. Williams,
490 U.S. 319 (1989) ..... *passim*

Pedraza v. Meyer,
919 F.2d 317 (5th Cir. 1990) 13

Talbert v. United States,
932 F.2d 1064 (4th Cir. 1991) 14

STATUTES

Prison Litigation Reform Act of 1995, Pub. L. No.
104-134, §§ 801-10, 110 Stat. 1321 ..... *passim*

Pub. L. No. 104-134 § 803(d) 13

Pub. L. No. 104-134 § 805(a) (codified as 28 U.S.C.
§ 1915A) 13

Cited Authorities

	Page
Law of July 20, 1892, ch. 209, § 4, 27 Stat. 252 (1892)	12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1346(b)(1)	14
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80	2
28 U.S.C. 1346(b)(2)	11
28 U.S.C. § 1915(b)(1)	3
28 U.S.C. § 1915(d)	7, 8
28 U.S.C. § 1915(e)(2)	1
28 U.S.C. § 1915(e)(2)(B)(i)	i
28 U.S.C. § 1915A	13
28 U.S.C. § 1932	11
42 U.S.C. § 1997e	12
42 U.S.C. § 1997e(a)	11
RULES	
Fed. R. Civ. P. 12(b)(6)	6, 8

Page

OTHER AUTHORITIES

Margo Schlanger, *Inmate Litigation*,
116 HARV. L. REV. 1555 (2003) 10

Robert G. Bone, *Modeling Frivolous Suits*,
145 U. PA. L. REV. 519 (1997) 15

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated July 21, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of North Carolina Dated January 21, 2003 ..... 14a

Appendix C — Order Of The United States District Court For The Eastern District Of North Carolina Dated December 30, 2002 ..... 16a

Appendix D — Administrative Denial Of Claim Dated July 23, 2002 ..... 18a

Appendix E — 28 U.S.C. § 1915, Proceedings In Forma Pauperis 20a

Petitioner Paul Nagy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth-Circuit Court of Appeals is reported at 376 F.3d 252 (2004) and is reproduced in the appendix (App. at 1a-13a). The United States District Court for the Eastern District of North Carolina issued an order dismissing Mr. Nagy's case. That order is unreported and is reproduced in the appendix (App. at 14a-15a). The District Court's separate, unreported order allowing Mr. Nagy to proceed *in forma pauperis* and assessing the filing fee against Mr. Nagy's future trust account earnings is reproduced in the appendix (App. at 16a-17a). The letter to Mr. Nagy from the Regional Counsel of the Federal Bureau of Prisons denying his administrative claim is reproduced in the appendix (App. at 18a-19a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute governing proceedings *in forma pauperis*, 28 U.S.C. § 1915(e)(2), as amended by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321, is set forth in the appendix (App. at 20a-24a).

STATEMENT OF THE CASE

A. Mr. Nagy's Tort Claim

Petitioner Paul Nagy has been in the Federal Medical Center in Butner, North Carolina since October 2000 receiving treatment so that he may one day be well enough to stand trial. On April 3, 2002, Mr. Nagy surrendered a bag of laundry to the Medical Center's institutional laundry for cleaning. When he returned to retrieve his cleaned clothing, the laundry staff could not find any of his garments, as they had been lost during the laundering process. The Medical Center replaced his institutional clothes, but refused to replace his personal clothing, which consisted of sweat pants and a sweat shirt.

Two weeks later, on April 17, 2002, Mr. Nagy filed an administrative claim against the Federal Medical Center for twenty-five dollars, the value of his lost sweatsuit. By letter dated July 23, 2002, the Regional Counsel for the Bureau of Prisons denied Mr. Nagy's monetary claim on the merits. App. at 18a-19a.

B. The District Court's Denial

Less than six months after the denial of his administrative claim, on December 16, 2002, Mr. Nagy filed a complaint *pro se* in the United States District Court for the Eastern District of North Carolina, alleging the same facts as in his administrative claim. His suit was brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80.

That same day, Mr. Nagy filed an application to proceed *in forma pauperis*, so that he could file his complaint without

the prepayment of fees. The District Court ruled that Mr. Nagy could proceed *in forma pauperis* on the basis of his application on December 29, 2002. App. at 16a-17a. In accordance with the requirement of the *in forma pauperis* statute, 28 U.S.C. § 1915(b)(1), the District Court ordered "appropriate officials at the correctional facility at which the plaintiff is incarcerated . . . to deduct monthly payments of 20 percent of the preceding month's income credited to the plaintiff's trust fund account, until the $150.00 filing fee is paid in full." App. at 17a.

Three weeks later, on January 21, 2003, and without any further briefing and before service of the complaint on the United States Attorney's Office, the District Court summarily dismissed Mr. Nagy's complaint. App. at 14a-15a. The District Court deemed Mr. Nagy's claim frivolous within the meaning of the *in forma pauperis* statute, which allows summary dismissal of "frivolous or malicious" suits. App. at 15a. The District Court stated: "A claim for *de minimis* damage constitutes a frivolous claim within the meaning of this 28 U.S.C. § 1915(e)(2)(B)." App. at 15a.

On March 24, 2003, Mr. Nagy filed a timely notice of appeal from the District Court's dismissal of his lawsuit.

C. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's dismissal of Mr. Nagy's claim. The Supreme Court had previously held in *Neitzke v. Williams*, 490 U.S. 319 (1989), that a claim "is frivolous where it lacks an arguable basis either in law or in fact." *Id.* at 325. While recognizing the correctness of this formulation and implicitly acknowledging that Mr. Nagy's claim met this test, the Court of Appeals

asserted that "the [Supreme] Court did not purport to make this an exhaustive formulation of the term 'frivolous.'" App. at 8a.

Instead, according to the Court of Appeals, when faced with an *in forma pauperis* suit, "district courts are at liberty to consider any factors that experience teaches bear on the question of frivolity." App. at 9a. It is a "flexible analysis," in which the courts must "sift out claims that Congress found not to warrant extended judicial treatment," and performed "in light of the totality of the circumstances, of all factors bearing upon the frivolity of a claim." App. at 8a-9a.

Thus, while the Court of Appeals apparently recognized that Mr. Nagy's claim, neither legally nor factually frivolous, would survive the Supreme Court's previous formulation of the frivolousness standard, a consideration of the "totality of the circumstances" surrounding Mr. Nagy's claim would lead to a conclusion that his claim was nonetheless frivolous. The Court of Appeals held that the small value of Mr. Nagy's claim was a permissible factor in the District Court's frivolity determination.

The Court of Appeals asserted that the value of the claim alone cannot be the sole basis of a frivolousness dismissal. But even though the District Court mentioned no other factors, the Court of Appeals affirmed the District Court's dismissal because, it speculated, the District Court "was undoubtedly aware of the other factors justifying dismissal of Nagy's complaint." App. at 12a. The District Court's failure to enunciate these factors was excused because, "[g]iven the fact that the totality of circumstances clearly supported the exercise of the district court's discretion, it would serve no purpose to have that court state

on remand every consideration of which it was already aware." App. at 12a. Reading the District Court's opinion "in context," the Court of Appeals explained, "it is clear that the court's emphasis on the de minimis value of Nagy's claim did not indicate an exclusive consideration of that factor, but rather a decision to refer to it because of its relevance in the overall balance." App. at 12a.[1]

Following the decision of the Court of Appeals, Mr. Nagy timely filed this Petition for a Writ of Certiorari, seeking review of the Court of Appeals' order.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Court of Appeals is necessary because it conflicts with the Supreme Court's previous definition of "frivolous" claims as those lacking factual reasonableness or legal merit. Review by this Court is also necessary to ensure the proper and uniform administration of Congress's landmark Prison Litigation Reform Act of 1995.

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1. The opinion of the Court of Appeals echoes the Third Circuit Court of Appeals' decision in *Deutsch v. United States*, 67 F.3d 1080 (1995), which affirmed a district court's dismissal as "frivolous" of an *in forma pauperis* claim against the federal government for the $4.20 value of pens allegedly taken by prison guards. However, *Deutsch* was decided before the Prison Litigation Reform Act of 1995, which specifically dealt with the lack of economic disincentives to filing frivolous and small-stakes claims by imposing the filing fee on all *in forma pauperis* plaintiffs. *See infra* Part II.

I. THE COURT OF APPEALS' DECISION PRESENTS AN IMPORTANT QUESTION BECAUSE IT CONFLICTS WITH THE SUPREME COURT'S DEFINITION OF "FRIVOLOUS" SUITS UNDER THE *IN FORMA PAUPERIS* STATUTE

The Court should grant this Petition because the Court of Appeals' decision conflicts with the Supreme Court's previous rulings defining "frivolous" suits. According to those rulings, the statute limits "frivolous"-based dismissals to claims that rely on indisputably meritless legal theories or clearly baseless factual contentions.

The Supreme Court first defined the "frivolous" term in its 1989 decision *Neitzke v. Williams*, 490 U.S. 319 (1989). In that case, a prison inmate sued prison staff alleging they violated the Eighth Amendment by providing deficient medical care. The district court dismissed the suit as frivolous because the inmate's "pleadings did not state a claim of 'deliberate indifference to [his] serious medical needs,' as prisoners' Eighth Amendment claims must . . . but instead described a constitutionally noncognizable instance of medical malpractice." *Id.* at 321-22 (alteration in original) (citation omitted). The Supreme Court disagreed with the district court's conclusion that a lawsuit that failed to state a valid claim under Federal Rule of Civil Procedure 12(b)(6) was automatically frivolous within the meaning of the *in forma pauperis* statute.

This Court concluded that "a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. The Court employed the same definition of "frivolous" three years later in *Denton v.*

Hernandez, 504 U.S. 25 (1992). In that case, the Court had to decide whether the district court had properly dismissed a claim alleging repeated sexual assaults by inmates and guards. In upholding the district court's determination, the Supreme Court again held that a claim can be dismissed as frivolous under 28 U.S.C. § 1915(d)[2] either if it has no arguable basis in law or if its "factual contentions are clearly baseless." *Denton*, 504 U.S. at 25, 32 (citation omitted).

Although *Neitzke* and *Denton* were not specifically addressing the situation of an *in forma pauperis* plaintiff who brings a small-stakes tort claim, *Neitzke* indicated its intention to formulate a definitive frivolousness standard. Faced with defining the term for the first time since the *in forma pauperis* statute was passed in 1892, this Court explained:

> The brevity of § 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915(d)'s indefinite adjectives. Articulating the proper contours of the § 1915(d) term 'frivolous,' which neither the statute nor the accompanying congressional reports defines, presents one such task.

Neitzke, 490 U.S. at 324-25 (footnote omitted). The Court then proceeded to formulate its definition of a frivolous claim as one lacking an arguable basis in law or fact.

The Supreme Court did not include within "the proper contours of the § 1915(d) term 'frivolous'" suits, such as

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2. Until the Prison Litigation Reform Act of 1995, the provision allowing dismissal of "frivolous" suits was contained in 28 U.S.C. § 1915(d).

Mr. Nagy's, that may seem insubstantial but nevertheless are legally meritorious and have a solid factual basis. Thus, the Court of Appeals' frivolousness test is overly broad and wrong, as it would encompass Mr. Nagy's claim as well as other legally non-frivolous claims brought by prisoners. Any property loss case by a prisoner will tend to seek recovery of only a small amount. As a practical matter, all such small cases are now likely to be dismissed, even if they are legally valid and based on plausible facts.

The Supreme Court in *Neitzke* rejected a previous judicial attempt to similarly reduce the number of *in forma pauperis* claims by improperly broadening the definition of "frivolous" beyond that term's meaning. The Court explained that the district court's definition of "frivolous" to include Rule 12(b)(6)-deficient claims was improper because such claims do not necessarily lack an arguable legal basis. *See id.* at 328. "To the extent that a complaint filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal. But the considerable common ground between these standards does not mean that the one invariably encompasses the other." *Id.* (footnote omitted). "That frivolousness in the § 1915(d) context refers to a more limited set of claims than does Rule 12(b)(6) accords, moreover, with the understanding articulated in other areas of law that not all unsuccessful claims are frivolous." *Id.* at 329. The Court concluded by stating: "It can hardly be said that the substantial legal claims raised in these cases were so defective that they should never have been brought at the outset. To term these claims frivolous is to distort measurably the meaning of frivolousness both in common and legal parlance." *Id.* at 328-29.

The Supreme Court has similarly warned the district courts against interpreting "frivolous" too broadly in the factual context. According to the Court, a dismissal based on factual frivolousness may only occur where "the facts alleged rise to the level of the irrational or the wholly incredible," although dismissal is not proper "simply because the court finds the plaintiff's allegations unlikely." *Denton*, 504 U.S. at 33.

In striking down the district court's attempt to stretch the meaning of legal frivolousness, the Supreme Court in *Neitzke* warned that its "role in appraising petitioners' reading of § 1915(d) is not to make policy, but to interpret a statute. . . . Appealing though petitioners' proposal may appear as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable." *Neitzke*, 490 U.S. at 326.

This Court should rule that the Court of Appeals' holding exceeds the Supreme Court's rulings limiting the "frivolous" term to those suits that lack legal merit or a factual basis. The Court of Appeals' "broadbrush" rule adversely impacts those parties who previously had the right to bring legally meritorious claims for negligent deprivation of property against the government, regardless of whether they could afford to pay the filing fee. The Court of Appeals' ruling, were it allowed to stand, places justice further out of reach of *in forma pauperis* claimants – in direct contradiction to the statute's purpose to ensure that indigent plaintiffs are not disadvantaged in relation to those with the means to pay the filing fee.

II. THE COURT OF APPEALS' DECISION PRESENTS AN IMPORTANT QUESTION BECAUSE IT DISTURBS CONGRESS'S DETAILED STATUTORY SCHEME FOR SCREENING PRISONER LAWSUITS ESTABLISHED BY THE PRISON LITIGATION REFORM ACT

The Court should also grant this Petition because the Court of Appeals' decision is contrary to Congress's intent in the Prison Litigation Reform Act of 1995 ("PLRA") to dissuade prisoner suits in general while taking care to not exclude legally valid suits. To the extent that the Court of Appeals' decision allows the dismissal of such legally valid suits as frivolous based on factors having little or nothing to do with that claim's legal or factual merit, the Court of Appeals has interfered with Congress's policymaking role in managing prisoner access to the federal courts.

The rapid and expansive development of legal claims under Section 1983 and other constitutional theories, a growing prison population, and other factors, have combined in past decades to lead to a proliferation of prisoner litigation, some of it meritorious, much of it not. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558, 1573 n.52 (2003). Faced with this problem, Congress responded in 1995 with the Prison Litigation Reform Act. The Act has slowed prisoner litigation. *See Crawford-El v. Britton*, 523 U.S. 574, 597 n.18 (1998) (discussing the drop in prisoner civil rights suits filed in federal court due to the PLRA); *Johnson v. Daley*, 339 F.3d 582, 595 (7th Cir. 2003) ("That the PLRA has led prisoners to cut by half their propensity to sue shows that they *do* respond to incentives.").

The PLRA was a reasoned and detailed solution to the problem of proliferating prisoner claims. It provides various additional criteria for screening and dismissing prisoner claims. For example, prisoners are now prohibited from bringing a suit with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Also, certain prisoners suing under the Federal Tort Claims Act must now make a prior showing of physical injury in order to bring an action for "mental or emotional injury suffered while in custody." 28 U.S.C. § 1346(b)(2). And prisoners who have filed at least three frivolous, malicious, or other baseless suits are prohibited from bringing additional *in forma pauperis* claims. App. at 24a. In addition to these and other screening tools, the PLRA provides for specific sanctions against prisoner litigants bringing improper claims, including the revocation of "good time credit" of prisoners bringing claims for malicious purposes or solely to harass a party. 28 U.S.C. § 1932. Nowhere in these and other provisions of the PLRA designed to reduce prisoner litigation did Congress establish a monetary threshold test for prisoners bringing claims for property damage or loss caused by the prison system.

Three other provisions of the PLRA particularly demonstrate that Congress has fully addressed the problem of cases brought as sport by prisoners who lack the usual litigation disincentives. First, Congress imposed the filing fee on all prisoner suits. According to the Act, "if a prisoner brings a civil action . . . in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." App. at 21a. This provision was intended to require prisoners to inquire, as a paying litigant would, whether bringing their lawsuit was worth the costs. Notably, this

provision did not grant new authority to the courts to dismiss claims that should have been, but were not, screened by the filing fee requirement.

Second, the PLRA added two new bases of dismissal to the existing "frivolous or malicious" standards. The statute now requires[3] a district court to dismiss an action that "fails to state a claim on which relief may be granted [or] seeks monetary relief against a defendant who is immune from such relief." App. at 23a. The PLRA enables judges to screen such actions, in addition to those presenting delusional facts and frivolous legal claims, at the commencement of the suit, and not after the pleading stage has already begun. This provision evidences Congress's preference to add specific bases of dismissal to control prison litigation as opposed to merely broadening the permissible scope of the courts' discretion in dismissing suits that are legally meritorious but which the courts deem to be defective in other respects.

Third, under the PLRA, courts can dismiss claims as frivolous even if they are not filed under the *in forma pauperis* statute. Section 803(d) of the Act, called "Suits by Prisoners," amended 42 U.S.C. § 1997e to require the dismissal of "any action brought with respect to prison conditions . . . by a prisoner . . . if the court is satisfied that the action is

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3. Prior to the PLRA, the dismissal provisions of the *in forma pauperis* statute stated that "the court . . . may dismiss any such case so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." Law of July 20, 1892, ch. 209, § 4, 27 Stat. 252 (1892). Under the PLRA, courts "shall" dismiss cases brought under the Act upon making such determinations.

frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Pub. L. No. 104-134 § 803(d). And section 805 of the Act, entitled "Judicial Screening," requires courts to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." *Id.* § 805(a) (codified as 28 U.S.C. § 1915A). These provisions of the PLRA demonstrate that the frivolousness standard – assuming it is to be applied uniformly to prisoner claims – must be the same whether applied to paying or *in forma pauperis* litigants.

Taken together, these three provisions of the PLRA demonstrate Congress's intent to limit frivolous and insubstantial suits without ceding to the courts the authority to deem which suits are important enough to proceed, whether or not based on a claim's monetary amount. Congress could have, but did not, allow for such wide-ranging discretion.

The opinion of the Court of Appeals demonstrates the dangers of ignoring the guidance provided by the Supreme Court's formulation of a "frivolous claim" in *Neitzke* and the evident congressional intent in the PLRA. For instance, the Court of Appeals noted that "[t]he investigation by the Bureau of Prisons uncovered no evidence that the FMC staff failed to abide by the institution's procedure of placing a security tie on laundry bags when it accepted Nagy's bag." App. at 11a. But this factor represents an improper inquiry into the merits of Mr. Nagy's claim and lends the one-page administrative determination denying Mr. Nagy's claim weight to which it is arguably not entitled. *See, e.g.*, *Pedraza v. Meyer*, 919 F.2d 317, 319 (5th Cir. 1990) (determination of whether a suit is frivolous is not a decision on the merits).

Two other factors cited by the Court of Appeals supporting the District Court's dismissal are also improper. The Court of Appeals noted that "[t]here has been no assertion that Nagy lost anything else on this or any other occasion," and that "[t]here has been no allegation here that the FMC, its institutional laundry service, or the service's staff had a policy or even habit of losing inmates' clothing." App. at 11a. These factors appear founded on the idea that an assertion of a single instance of "ordinary" negligence tends to be frivolous. Such a presumption is improper as it prejudices negligence claims that are legally sufficient and entitled to redress under the Federal Tort Claims Act.

The Court of Appeals cited yet another improper factor in favor of dismissal, that "Nagy did not present any claims for declaratory or injunctive relief." App. at 11a. But monetary damages are the only relief that is available under the Federal Tort Claims Act. *See* 28 U.S.C. § 1346(b)(1); *Talbert v. United States*, 932 F.2d 1064, 1065-66 (4th Cir. 1991) ("The only relief provided for in the Act is 'money damages.' To the extent that Talbert is seeking other relief, we lack jurisdiction under the FTCA to accord it.") (citations omitted). It was thus unfair for the Court of Appeals to penalize Mr. Nagy for his failure to seek non-monetary relief.

Even a test in which courts would give serious consideration to multiple, relevant factors would be flawed. But as a practical matter, it is highly unlikely that the amorphous factors in the Court of Appeals' test could ever overcome the small size of a prisoner's claim. Thus, the effect of the Court of Appeals' rule likely will be to allow courts to eliminate legally meritorious suits based on their small size. Prisoner litigants with real grievances would be adversely affected by such a rule. On the whole, prisoners have little personal property subject to the control of the prison system. Therefore, the loss or damage of

these prisoners' property by prison employees arguably has a large significance to the potential prison litigant. Furthermore, because of the pervasive involvement of the prison system over nearly every aspect of a prisoner's life, prisoners have a great interest in deterring prison officials' tortious conduct. The small victory today may avoid a greater harm tomorrow. Though the deterrence benefits that inure to the litigant and the prison system as a whole are not easily measured in economic terms, legally valid suits that cost more than the recovery are nonetheless legitimate and purposeful:

> To condemn [a] suit as frivolous, one would have to believe that suits with positive expected value from a plaintiff's subjective point of view are the only suits that should consume the resources of a publicly subsidized court system. This is an extremely difficult position to defend on normative grounds. It is especially problematic for anyone who . . . views litigation in efficiency terms. After all, a suit that has negative expected value to a plaintiff might have positive value to society once externalized public benefits are taken into account.

Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 530 n.44 (1997). That is why it makes sense to continue defining "frivolous" strictly in terms of the arguable legal sufficiency of the claim and its factual plausibility, and not to impose a judgment about the importance of the claim.

The Court should grant Mr. Nagy's petition because the Court of Appeals' indefinite, multifactor test for dismissing claims it deems to be insubstantial conflicts with this Court's

prior definition of "frivolous" in the *in forma pauperis* statute and with Congress's desire in the PLRA not to eliminate legally meritorious claims that prisoners decide to file despite the filing fee provisions of the Act. The consequences of the Court of Appeals' opinion is to upset Congress's careful structure, based on economic disincentives and specific grounds of dismissal, for controlling prison litigation.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JULY 21, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-6736

PAUL NAGY,

Plaintiff-Appellant,

v.

FMC BUTNER,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence William Boyle, Chief District Judge

Argued: June 2, 2004

Decided: July 21, 2004

Before WILKINSON, SHEDD, and DUNCAN, Circuit Judges.

OPINION

WILKINSON, Circuit Judge:

This appeal requires us to decide whether a district court may consider the value of a prisoner's claim when determining whether to dismiss it as frivolous under the in

forma pauperis statute. *See* 28 U.S.C. § 1915(e)(2)(B)(i) (2000). Appellant Paul Nagy, an inmate at the Federal Medical Center (FMC) in Butner, North Carolina, claims that the institution's laundry service lost his twenty-five dollar sweat suit while it was being cleaned. Nagy brought an administrative claim to recover twenty-five dollars under the Federal Torts Claims Act (FTCA). *See* 28 U.S.C. § 2672 (2000). The Bureau of Prisons denied the claim finding no evidence of wrongdoing by the FMC staff. Nagy then filed a complaint against the FMC in federal court. Ultimately, the court dismissed his complaint as frivolous within the meaning of 28 U.S.C. § 1915(e)(2)(B)(i). On appeal, Nagy contends that the district court erred by dismissing his suit, and in particular by considering the de minimis value of his claim in reaching its conclusion of frivolousness

We hold that the amount sought in an in forma pauperis suit is a permissible factor to consider when making a frivolity determination under § 1915(e)(2)(B)(i). Further, the district court did not abuse its discretion in dismissing Nagy's claim based in part on its de minimis value. We accordingly affirm the judgment.

I.

Nagy is a medical patient incarcerated at the FMC in Butner pending the restoration of his competency. On April 3, 2002, Nagy delivered a bag of clothes to the FMC laundry for cleaning. The laundry's practice is to place a tamper-proof security tie on inmates' laundry bags when they are turned in, and to remove the security tie when they are later picked up. When Nagy collected his laundry the day after dropping

it off, however, the bag was empty and his clothes could not be found. According to Nagy's complaint, the security tie fell off during washing or drying. The FMC replaced Nagy's institutional clothing but not his private clothing, which was a sweat suit worth about twenty-five dollars.

Pursuant to the FTCA, 28 U.S.C. § 2672, Nagy filed an administrative claim against the FMC on April 17, 2002, seeking twenty-five dollars in compensation for the lost sweat suit. The Regional Counsel for the Bureau of Prisons denied his claim, explaining that the FTCA would compensate Nagy only for the loss of property resulting from the negligence, omission, or wrongful act of a Bureau of Prisons employee. Here, there was no evidence that the FMC institutional staff failed to abide by its normal procedure of placing a tamper-proof security tie on the laundry bag when Nagy turned in his clothes. The Regional Counsel also noted that, in the clothing exchange area, signs on each window warn that the FMC laundry service bears no responsibility for lost or damaged clothing.

Dissatisfied with this administrative determination, Nagy brought his FTCA claim in federal district court. He sought compensatory and punitive damages in the amount of $4,000, due to the loss of his sweat suit and the alleged "malicious" denial of his administrative claim. The district court granted Nagy's application to proceed in forma pauperis in December 2002, permitting him to pursue his claims without prepaying the filing fees. Pursuant to the provision for deferred fee payment in 28 U.S.C. § 1915(b)(2), the court ordered FMC officials to deduct certain monthly payments from Nagy's prison trust fund account until the filing fee had been paid in full.

Appendix A

On January 21, 2003, the district court dismissed Nagy's complaint. The court first rejected Nagy's claim for punitive damages on the grounds that such damages are not recoverable under the FTCA. *See* 28 U.S.C. § 2674 (2000). Second, the court dismissed Nagy's claim for actual damages as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i), citing in particular the de minimis value of his suit for twenty-five dollars. While conceding that his claim for punitive damages was properly dismissed, Nagy challenges the district court's frivolity determination regarding his compensatory damages.

II.

We apply an abuse of discretion standard when reviewing a district court's decision to dismiss an in forma pauperis complaint under § 1915(e)(2)(B)(i). *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *see also Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 954-55 (4th Cir. 1995) (finding a deferential standard of review faithful to statutory text and congressional intent).* Nagy contends that deferential review

* Prior to the most recent PLRA amendments, dismissals for frivolity were reviewed for abuse of discretion. *Denton*, 504 U.S. at 33. After the amendments, those circuits that have addressed the issue have generally retained the abuse of discretion standard when reviewing claims dismissed as frivolous under § 1915(e)(2)(B)(i). *See, e.g., Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (endorsing abuse of discretion standard); *McWilliams v. Colo.*, 121 F.3d 573, 574-75 (10th Cir. 1997) (same); *see also Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 775 (7th Cir. 2002) (indicating same for dismissals for factual frivolousness); *but see McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997) (dismissal under § 1915(e)(2) reviewed de novo). Concurring with the majority of our sister circuits, we continue to apply an abuse of discretion standard.

is inappropriate because the district court adopted a new legal definition of frivolousness in dismissing his claim. Since we conclude that § 1915(e)(2)(B)(i) permits district courts, as a matter of law, to consider the size of a claim as a factor bearing on frivolity, review of dismissal for frivolousness under an abuse of discretion standard remains appropriate.

III.

The progenitor of the current in forma pauperis statute permitted indigent litigants to bring suit without the payment of filing fees, upon a showing of economic hardship. *See* 28 U.S.C. § 1915(a) (1994). The statute thus provided impecunious parties access to federal courts that they could not otherwise afford. *See Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 342 (1948). *See also Coppedge v. United States*, 369 U.S. 438, 447 (1962) (in forma pauperis statute designed to ensure "equal treatment for every litigant before the bar").

Dispensing with filing fees, however, was not without its problems. Parties proceeding under the statute did not face the same financial constraints as ordinary litigants. In particular, litigants suing in forma pauperis did not need to balance the prospects of successfully obtaining relief against the administrative costs of bringing suit. *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989). Permitting indigent litigants to avoid filing fees, therefore, risked encouraging suits that these fees might otherwise have deterred.

Mindful of this danger, Congress authorized district courts to dismiss in forma pauperis suits "if satisfied that the action is frivolous or malicious." *See* 28 U.S.C. § 1915(d) (1994) (codified as amended at 28 U.S.C. § 1915(e)(2)(B)(i) (2000)). This authority was interpreted to confer broad discretion on the district courts to police in forma pauperis filings. *See Denton*, 504 U.S. at 33. The frivolousness inquiry ensured that federal resources would not be wasted on "baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit." *Neitzke*, 490 U.S. at 327. Trial courts were charged with ensuring that the in forma pauperis mechanism, designed to promote equality of access to court, did not end up advantaging indigent litigants over their paying peers.

Despite the best efforts of the district courts to fulfill this mandate, in forma pauperis suits continued to proliferate, particularly those brought by prisoners. *See Nasim*, 64 F.3d at 954; *id.* at 957-58 (Wilkinson, J., concurring). The sheer volume of these suits placed severe pressure on the courts. *See Free v. United States*, 879 F.2d 1535, 1536 (7th Cir. 1989).

In response to this problem, Congress added various provisions to the in forma pauperis statute, as part of the Prison Litigation Reform Act in 1996 (PLRA). The new provisions require that the district courts dismiss any "action or appeal" which "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). Further, while the old statute merely permitted dismissal when the district court was "satisfied" that a suit was frivolous, the new language requires dismissal in similar circumstances. Lastly,

in forma pauperis litigants are no longer able to avoid paying filing fees entirely — they must now pay these on a deferred basis. *See* 28 U.S.C. § 1915(b).

The PLRA amendments do not, however, assist the appellant. Indeed, they were designed to strengthen, not vitiate, the role of district courts. It is not correct to infer from the amendments, as the appellant suggests, that Congress intended to limit district courts' discretion when it added the "failure to state a claim" provision and the deferred payment mechanism to the in forma pauperis statute. The specificity of the language in § 1915(e)(2)(B)(ii) should not be mistaken for an implied directive to district courts to refrain from exercising their discretion, under other parts of § 1915, to dismiss meritless, abusive, or other baseless litigation. Neither should the introduction of a deferred payment mechanism be mistaken for an implied congressional intention that this mechanism would be a panacea for excessive in forma pauperis litigation. This court has indicated that the ability to dismiss frivolous complaints under § 1915 — an ability which Congress not only maintained but strengthened through the 1996 amendments — confers a "wide latitude" and "meaningful discretion" upon district courts. *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir.1994); *Nasim*, 64 F.3d at 954. Nothing suggests that the PLRA negated this discretion or that Congress intended to restrict the district courts' roles as gatekeepers under the in forma pauperis statute.

Neither is it correct to infer from the PLRA that the absence of a jurisdictional floor in § 1915 precludes a district court from considering the amount of relief requested when

deciding whether to permit a litigant to proceed in forma pauperis. The mere fact that Congress employs such floors in some statutes does not forbid courts from considering the size of a claim in all other instances, particularly when the operative statutory term is as flexible as "frivolous."

Nagy's attempt to construe Court precedent to preclude consideration of the size of a claim in interpreting the frivolity standard of § 1915(e) is similarly unpersuasive. *Neitzke* does not bar consideration of the size of a claim in interpreting § 1915(e)(2)(B)(i). The Court in *Neitzke* did state that a complaint "is frivolous where it lacks an arguable basis either in law or in fact." 490 U.S. at 325. But the Court did not purport to make this an exhaustive formulation of the term "frivolous" and this court has not suggested that any such comprehensive definition would be either possible or appropriate. *See White v. White*, 886 F.2d 721, 724 (4th Cir. 1989). Indeed, in *White* we observed that "district courts which must apply [the frivolity provision] on a day-to-day basis and in a myriad of contexts obviously will play a major role in fleshing out the standard." *Id.*

The word "frivolous" is inherently elastic and "not susceptible to categorical definition." *Adams*, 40 F.3d at 74. It is designed to confer on district courts the power to sift out claims that Congress found not to warrant extended judicial treatment under the in forma pauperis statute. *See id.*; *see also Deutsch v. United States*, 67 F.3d 1080, 1086-87 (3d Cir. 1995) (noting that § 1915 gives the judiciary "a sufficient scope of power to maintain meaningful control over the filing of in forma pauperis complaints"). The term's capaciousness directs lower courts to conduct a flexible

analysis, in light of the totality of the circumstances, of all factors bearing upon the frivolity of a claim. Just as district courts are in the "best position" to determine which claims are factually frivolous, *see Denton*, 504 U.S. at 33, they enjoy a comparative expertise in identifying frivolous suits generally. The overriding goal in policing in forma pauperis complaints is to ensure that the deferred payment mechanism of § 1915(b) does not subsidize suits that pre-paid administrative costs would otherwise have deterred. In implementing that goal, district courts are at liberty to consider any factors that experience teaches bear on the question of frivolity.

Whether the suit alleges significant or de minimis damages is among the many factors a district court may take into account in determining the frivolousness of a claim. Such consideration is "consistent with the goals of the in forma pauperis legislation." *Deutsch*, 67 F.3d at 1087. Nothing in the in forma pauperis statute, and nothing in 28 U.S.C. § 1915(e)(2)(B)(i) in particular, suggests that the de minimis value of a claim cannot be taken into account. Appellant points us to no judicial decision holding that this factor is inappropriate for consideration under 28 U.S.C. § 1915(e)(2)(B)(i). *See Deutsch*, 67 F.3d at 1085. Given the purpose of 28 U.S.C. § 1915(e)(2), to ensure that indigent litigants do not bring suit solely because of the public subsidy available under § 1915(b), it would make little sense to mandate that trial courts invariably entertain claims without any regard to their monetary value. Such a rigid rule might significantly increase in forma pauperis filings and it would do nothing to relieve the threat that severe docket congestion poses to adjudicative quality in federal courts. Moreover, a

rule that monetary value bore no relevance to frivolousness would thrust the federal judiciary deep into the minutiae of prison administration. We are not persuaded that Congress intended such results, which would be inconsistent both with the overriding purpose of the statute and with the appropriate deference due to prison authorities.

While we understand that items of small value may have large meaning, the unfortunate loss of such items cannot necessarily translate into the privilege of proceeding in forma pauperis. Courts may thus consider the de minimis value of a claim as one factor in applying the frivolity test of 28 U.S.C. § 1915(e)(2)(B)(i).

IV.

Nagy next argues that, even if the amount sought in an in forma pauperis suit may be taken into account when making a frivolity determination under 28 U.S.C. § 1915(e)(2)(B)(i), the district court still erred in finding his claim to be frivolous. The district court initially noted that, under *Neitzke*, "a claim having no arguable basis in law or in fact may be dismissed as frivolous." It then declared that, "[a]s for the claim for actual damages, the Court finds the claim to be frivolous." In explaining this conclusion, the court alluded to the fact that Nagy's claim was for de minimis damages:

> Even though the FTCA does not establish a threshold jurisdictional amount, a complaint may still be dismissed as frivolous under the *in forma pauperis* statute. . . . A claim for *de minimis*

> damage constitutes a frivolous claim within the meaning of . . . 28 U.S.C. § 1915(e)(2)(B).

Accordingly, the court dismissed the action pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

Given the totality of the circumstances, we cannot say that the district court's finding of frivolousness constituted an abuse of discretion. As the district court observed, Nagy's claim was for one sweat suit worth twenty-five dollars. The investigation by the Bureau of Prisons uncovered no evidence that the FMC staff failed to abide by the institution's procedure of placing a security tie on laundry bags when it accepted Nagy's bag. There has been no allegation here that the FMC, its institutional laundry service, or the service's staff had a policy or even habit of losing inmates' clothing. There has been no assertion that Nagy lost anything else on this or any other occasion. Nagy did not present any claims for declaratory or injunctive relief and his grievance appears to be a single instance of lost laundry totaling twenty-five dollars — a grievance that has already been deemed without merit under the FTCA by the Bureau of Prisons. Finally, the request for almost $4,000 in punitive damages for the loss of this twenty-five dollar item did nothing to strengthen the seriousness of Nagy's claim. We do not intend these factors to constitute an exclusive list or to imply that a conclusory assertion of a factor not present in Nagy's complaint would ensure a determination of non-frivolousness. We also do not suggest that any personal liberty/property rights distinction should govern the assessment of claims under the in forma pauperis statute. *See Weddle v. Director, Patuxent, Inst.*, 436 F.2d 342 (4th Cir. 1970), *rev'd* 405 U.S. 1036 (1972).

We simply address this case on its own terms. The district court, acting as gatekeeper under 28 U.S.C. § 1915(e)(2), was within its discretion in adjudging Nagy's claim to be frivolous in these circumstances.

Nagy protests, however, that the district court failed to take into account factors other than the de minimis value of his claim. In Nagy's view, the district court effectively applied a per se rule requiring dismissal of all de minimis claims, or at the very least, all claims of twenty-five dollars or less. Such an application of 28 U.S.C. § 1915(e)(2)(B)(i), Nagy urges, is inconsistent with the flexible nature of frivolity analysis.

Although the district court focused the explanation of its frivolity determination on the de minimis value of Nagy's suit, its conclusion was broadly stated, and it was undoubtedly aware of the other factors justifying dismissal of Nagy's complaint. When read in context, it is clear that the court's emphasis on the de minimis value of Nagy's claim did not indicate an exclusive consideration of that factor, but rather a decision to refer to it because of its relevance in the overall balance. We do not read the district court to establish a de facto jurisdictional amount, and, indeed, such an application of the in forma pauperis statute would be incompatible with the flexible nature of the frivolity determination. Given the fact that the totality of circumstances clearly supported the exercise of the district court's discretion, it would serve no purpose to have that court state on remand every consideration of which it was already aware.

V.

We thus affirm the district court's dismissal of Nagy's in forma pauperis suit. We do not think, however, that Congress intended a dismissal under § 1915(e)(2)(B)(i) of the in forma pauperis statute to operate as a dismissal with prejudice. *See Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 775 (7th Cir. 2002). Nagy therefore remains free to file a paid complaint with these same allegations. We of course express no view on the proper disposition of that case.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DATED JANUARY 21, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:02-CT-922-BO

PAUL NAGY,

Plaintiff

v.

FEDERAL MEDICAL CENTER,

Defendant.

ORDER

The Plaintiff filed this action under the Federal Tort Claims Act. Furthermore, he seeks leave to file *in forma pauperis* under 28 U.S.C. § 1915. The matter is before the court for a frivolity determination pursuant to 28 U.S.C. § 1915(e)(2). A claim having no arguable basis in law or in fact may be dismissed as frivolous. *Neitzke v. Williams*, 490 U.S. 319 (1989).

The Plaintiff's claim is that the laundry at the Federal Medical Center lost his bag of clothing. The institutional clothing was replaced, but his sweat pants and shirt were never recovered. He values the sweat suit at $25.00. Presently,

because of the treatment he claims he has received, he seeks $4,000.00 in damages.

To begin, the Court dismisses Plaintiff's claim for punitive damages. 28 U.S.C. § 2674 prohibits punitive damages for claims brought under the FTCA. The Court, therefore, lacks subject matter jurisdiction over any claim by Plaintiff for punitive damages and dismisses that part of the claim on such basis.

As for the claim for actual damages, the Court finds the claim to be frivolous. The actual injury for which he could be entitled to compensatory damages is *de minimis*, the loss of a $25.00 sweat suit.

Even though the FTCA does not establish a threshold jurisdictional amount, a complaint may still be dismissed as frivolous under the *in forma pauperis* statute, which applies here to the Plaintiff. A claim for *de minimis* damage constitutes a frivolous claim within the meaning of this 28 U.S.C. § 1915(e)(2)(B). *See, e.g., Deutsch v. United States*, 67 F.3d 1080, 1084 (3rd Cir. 1995) (affirming the district court's dismissal of an FTCA complaint for several lost pens.)

ACCORDINGLY, the matter is DISMISSED as FRIVOLOUS. SO ORDERED, this 21 day of January 2003.

s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DATED DECEMBER 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-CT-922-BO

PAUL NAGY #37895-054,

Plaintiff

v.

FEDERAL MEDICAL CENTER,

Defendant(s).

ORDER

The plaintiff has initiated a civil action in this Court. Pursuant to 28 U.S.C. § 1915(b)(1) and (2), incarcerated plaintiffs who have initiated civil actions are required to pay the entire $150.00 filing fee. This fee is to be collected in two stages. The prisoner immediately owes an initial partial filing fee, equal to 20 percent of the greater of (1) the average monthly deposits to the prisoner's trust fund account or (2) the account's average monthly balance for the six month period immediately preceding the filing of the complaint. The remainder must be collected in monthly payments of 20 percent of the preceding month's income credited to the plaintiff's trust fund account.

Appendix C

In this case, the court finds that the plaintiff has no funds available from which to assess an initial partial filing fee. However, the appropriate officials at the correctional facility at which the plaintiff is incarcerated are ORDERED to deduct monthly payments of 20 percent of the preceding month's income credited to the plaintiff's trust fund account, until the $150.00 filing fee is paid in full.

Payments must be made payable to "Clerk, U.S. District Court" and transmitted to:

U.S. District Court
P.O. Box 25670
Raleigh, NC 27611
Attn: CRT Section

In the event the plaintiff is transferred to a different correctional facility, this financial responsibility must be transferred to the new correctional facility.

SO ORDERED, this 30th day of December, 2002.

s/ David W. Daniel
David W. Daniel, Clerk

APPENDIX D — ADMINISTRATIVE DENIAL OF CLAIM DATED JULY 23, 2002

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid-Atlantic Region

Butner Legal Center
P.O. Box 1500
Butner, North Carolina 27509

July 23, 2002

Paul Nagy
Reg# 37895-054
Federal Medical Center
P.O. Box 1500
Butner, NC 27509

Re: Tort Claim TRT-MXR-2002-09196

Dear Mr. Nagy:

This is in response to your claim submitted on April 17, 2002, pursuant to the Federal Tort Claims Act (FTCA), Title 28 U.S.C. § 2672, and authority granted under 28 C.F.R. § 0.172. You claim that Bureau of Prisons staff lost a sweat suit at the Federal Medical Center (FMC), Butner, North Carolina. You seek compensation in the amount of $25.00.

Investigation revealed that on April 3, 2002, you turned in a bag of laundry to the FMC institutional laundry for cleaning. When laundry is dropped off by inmates, a tamper-proof security tie is placed on the bag. At the end of the shift the

security tie is cut of by staff for pick up. There is no evidence that these security steps were not followed by institutional staff when you turned in your laundry. Furthermore, there are signs posted on each window in the clothing exchange area stating that the FMC laundry is not responsible for lost or damaged clothing.

The Federal Tort Claims Act only provides compensation for loss of property resulting from the negligence, omission, or wrongful act of Bureau of Prisons employees acting within the scope of their employment. Therefore, your claim is denied. If you are dissatisfied with this determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

s/ Bill Burlington
Bill Burlington
Regional Counsel

APPENDIX E — 28 U.S.C. § 1915, PROCEEDINGS IN FORMA PAUPERIS

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Appendix E

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of —

> **(A)** the average monthly deposits to the prisoner's account; or
>
> **(B)** the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

Appendix E

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that —

(A) the allegation of poverty is untrue; or

(B) the action or appeal —

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

Appendix E

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(2)

SUPREME COURT, U.S.
FILED
MAR 7 - 2005
OFFICE OF THE CLERK

No. 04-530

In the Supreme Court of the United States

PAUL NAGY, PETITIONER

v.

FMC BUTNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether a district court, exercising its discretion to determine whether a claim filed *in forma pauperis* is "frivolous" and therefore subject to dismissal under 28 U.S.C. 1915(e)(2)(B)(i), may consider the *de minimis* value of the claim.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Adkins v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948) 3
Boag v. *MacDougall*, 454 U.S. 364 (1982) 11
Denton v. *Hernandez*, 504 U.S. 25 (1992) 3, 6, 7, 8, 10
Deutsch v. *United States*, 67 F.3d 1080 (3d Cir. 1995) 9
Green v. *Nottingham*, 90 F.3d 415 (10th Cir. 1996) 11
Iwachiw v. *New York State Dep't of Motor Vehicles*, 396 F.3d 525 (2d Cir. 2005) 11
Nagy, In re, 529 U.S. 1065 (2000) 2
Nagy v. *Goldstein*, No. 98-2501(L), 1999 WL 357840 (2d Cir. May 20, 1999), cert. denied, 528 U.S. 1195 (2000) 2, 11
Nagy v. *Lappin*, 529 U.S. 1096 (2002) 2
Nagy v. *Schaefer*, 46 Fed. Appx. 166 (4th Cir. 2002) 2, 11
Nagy v. *Sweet*, No. 99-0065 (2d Cir. Feb. 25, 2000) 2, 11
Nagy v. *United States*, No. 99-2578 (2d Cir. June 22, 2000) 2, 112
Nagy v. *United States*, 529 U.S. 1106 (2000) 2

Cases—Continued: Page

Neitzke v. *Williams*, 490 U.S. 319 (1989) 3, 5, 6, 7

United States v. *Nagy*, 10 Fed. Appx. 67 (4th Cir. 2001), cert. denied, 534 U.S. 932 (2001) 2

Statutes and rules:

Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, 110 Stat. 1321-66 4

28 U.S.C. 1915(b) 4, 10

28 U.S.C. 1915(d) (1994) 4

28 U.S.C. 1915(d) 7

28 U.S.C. 1915(e) 7

28 U.S.C. 1915(e)(2) 4, 11

28 U.S.C. 1915(e)(2)(B) 5

28 U.S.C. 1915(e)(2)(B)(i) 6

28 U.S.C. 1915(g) 4, 9, 10, 11, 12

28 U.S.C. 2672 3

Fed. R. Civ. P. 12(b)(6) 7

Sup. Ct. R.:

Rule 38(a) 2

Rule 39.8 2

Miscellaneous:

H.R. Conf. Rep. No. 378, 104th Cong., 1st Sess. (1995) 4

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 376 F.3d 252. The opinion of the district court (Pet. App. 14a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2004. The petition for a writ of certiorari was filed on October 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Paul Nagy is incarcerated at the Federal Medical Center (FMC) in Butner, North Carolina, pending the restoration of his competency to stand trial.[1] Petitioner is no stranger to the federal

[1] Petitioner was arrested in 1995 based on allegations that he "threatened to cut off the head of a White House telephone operator"

courts, having filed numerous actions and appeals while in United States custody that have been dismissed as frivolous. See *Nagy* v. *Schaefer*, 46 Fed. Appx. 166, 167 (4th Cir. 2002) (unpublished) (per curiam) (dismissing appeal because it "is frivolous"); *Nagy* v. *United States*, No. 99-2578 (2d Cir. June 22, 2000) (denying motion to reinstate appeal and stating that "the appeal lacks an arguable basis in fact or law"); *Nagy* v. *Sweet*, No. 99-0065 (2d Cir. Feb. 25, 2000) (dismissing appeal for "lacking any basis in law"); *Nagy* v. *Goldstein*, No. 98-2501(L), 1999 WL 357840, at *1 (2d Cir. May 20, 1999) (unpublished) (affirming dismissal of consolidated complaint on ground that claims "lack an arguable basis in law or fact"), cert. denied, 528 U.S. 1195 (2000). This Court itself has denied petitioner leave to proceed *in forma pauperis* and dismissed petitioner's filings on at least three occasions, citing Supreme Court Rule 39.8, which authorizes the Court to take such action if the filing "is frivolous or malicious." See *In re Nagy*, 529 U.S. 1065 (2000); *Nagy* v. *Lappin*, 529 U.S. 1096 (2000); *Nagy* v. *United States*, 529 U.S. 1106 (2000). On May 15, 2000, this Court found that "petitioner has repeatedly abused this Court's process," and directed the Clerk "not to accept any further petitions in non-criminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1." *Nagy*, 529 U.S. at 1106-1107.

2. The predicate for petitioner's present lawsuit is his claim that the FMC's institutional laundry lost his sweat suit, which he valued at $25. Petitioner first

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and "fired shots inside his apartment" when Secret Service agents came to investigate the threat. See *United States* v. *Nagy*, 10 Fed. Appx. 67, 68 (4th Cir.) (unpublished), cert. denied, 534 U.S. 932 (2001).

brought an administrative claim under the Federal Tort Claims Act (FTCA). See 28 U.S.C. 2672. The Bureau of Prisons (BOP) denied the claim upon finding that there was no evidence that BOP staff failed to follow the security procedures established for handling inmate laundry and that signs are posted providing that the FMC laundry is not responsible for lost clothing. Pet. App. 18a-19a. Petitioner responded by filing a complaint in the District Court for the Eastern District of North Carolina seeking $4000 in compensatory and punitive damages under the FTCA for the loss of his sweat suit and the "malicious" denial of his administrative claim. *Id.* at 3a.

Petitioner moved to proceed *in forma pauperis*. By doing so, petitioner sought to benefit from federal law that is "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because * * * poverty makes it impossible * * * to pay or secure the costs" of litigation. *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948) (internal quotation marks omitted). As Congress recognized, however, one negative consequence of waiving or reducing fees for those unable to pay is that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989). To address this concern, Congress allowed a district court to dismiss a complaint filed *in forma pauperis* if it determined that the action was frivolous or malicious. *Denton* v. *Hernandez*, 504 U.S. 25, 27 (1992); *Neitzke*, 490 U.S. at 324.

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, 110 Stat. 1321-66 (PLRA), modified *in forma pauperis* law in part to "discourage frivolous and abusive prison lawsuits." H.R. Conf. Rep. No. 378, 104th Cong., 1st Sess. 166 (1995). The PLRA makes the dismissal of frivolous or malicious actions mandatory. See 28 U.S.C. 1915(e)(2) ("the court *shall* dismiss the case at any time if the court determines that * * * the action or appeal * * * is frivolous or malicious") (emphasis added).[2] The PLRA also added provisions specific to prisoner lawsuits, including provisions requiring prisoners to pay the filing fee on a deferred basis, 28 U.S.C. 1915(b), and barring a prisoner from proceeding *in forma pauperis* in the following circumstances:

> if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. 1915(g).

3. The district court granted petitioner's motion to proceed *in forma pauperis*, see Pet. App. 3a, 16a-17a,[3] and then dismissed his complaint. The district court dismissed petitioner's claim for punitive damages

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[2] The previous version of the statute provided that "[t]he court * * * *may* dismiss the case * * * if satisfied that the action is frivolous or malicious." 28 U.S.C. 1915(d) (1994) (emphasis added); see Pet. 12 n.3.

[3] The district court ordered petitioner to pay the filing fee in installments as required by 28 U.S.C. 1915(b). See Pet. App. 7a, 16a-17a.

because such damages are not available under the FTCA. The district court dismissed petitioner's remaining claim for compensatory damages in the amount of $25 as *de minimis* and "frivolous * * * within the meaning of" 28 U.S.C. 1915(e)(2)(B). Pet. App. 15a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court of appeals rejected petitioner's contention that the district court erred in holding that his claim was frivolous based on its *de minimis* value.[4] It observed that the *in forma pauperis* statute gives district courts "'wide latitude' and 'meaningful discretion' * * * as gatekeepers" and that the PLRA "was designed to strengthen, not vitiate, the role of the district courts" in screening out frivolous claims. *Id.* at 7a. It concluded that this Court's decision in *Neitzke* v. *Williams*, 490 U.S. 319 (1989), which held that a complaint whose allegations fail to state a claim is not necessarily frivolous under the *in forma pauperis* statute, did not preclude a district court from considering the value of a lawsuit as a factor relevant to its frivolousness. Although *Neitzke* stated that a complaint "is frivolous where it lacks an arguable basis either in law or in fact," 490 U.S. at 325, the court of appeals reasoned that the statement was not meant to exhaust the entire universe of frivolous claims, Pet. App. 8a. Instead, the court noted that the term "frivolous" is "inherently elastic," *ibid.*, and thus calls for "a flexible analysis, in light of the totality of the circumstances," *id.* at 8a-9a.

The court of appeals explained that the flexible inquiry must be conducted in line with the "overriding goal" of the statutory provision "to ensure that the

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[4] Petitioner conceded that his claim for punitive damages was properly dismissed. Pet. App. 4a.

deferred payment mechanism of § 1915(b) does not subsidize suits that pre-paid administrative costs would otherwise have deterred." Pet. App. 9a. In light of that goal, the court reasoned, "it would make little sense to mandate that trial courts invariably entertain claims without any regard to their monetary value," *ibid.*, because *de minimis* monetary value would often deter fee-paying litigants from pursuing a claim, while not similarly deterring litigants whose fees are publicly subsidized under the *in forma pauperis* provisions, *ibid.* The court of appeals accordingly held that "[c]ourts may thus consider the de minimis value of a claim as one factor in applying the frivolity test of 28 U.S.C. § 1915(e)(2)(B)(i)." *Id.* at 10a.[5]

ARGUMENT

Petitioner contends (Pet. 6-16) that the court of appeals' decision conflicts with this Court's decisions in *Neitzke* v. *Williams*, 490 U.S. 319 (1989), and *Denton* v. *Hernandez*, 504 U.S. 25 (1992), and with Congress's intent in enacting the PLRA. Petitioner is incorrect. The decision of the court of appeals does not conflict with any decision of this Court or with the PLRA, and it is consistent with the only other court of appeals decision to have addressed the issue presented. Moreover, because petitioner is ineligible for *in forma pauperis* status for additional reasons not addressed by the court

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[5] The court of appeals went on to explain that the district court had not abused its discretion in finding petitioner's claim frivolous. The court of appeals noted that a number of factors in addition to the claim's *de minimis* value supported the dismissal, including the lack of evidence that the laundry staff had failed to follow standard procedures or previously lost petitioner's (or other inmates') clothing. Pet. App. 11a.

of appeals, this Court cannot provide meaningful relief. Further review thus is not warranted.

1. Petitioner incorrectly asserts (Pet. 6-9) that the court of appeals' decision conflicts with this Court's decisions in *Neitzke* and *Denton*. In *Neitzke*, this Court held that a complaint that fails to state a claim within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure is not necessarily frivolous within the meaning of the *in forma pauperis* statute. 490 U.S. at 324.[6] In so holding, the Court stated that "a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Id.* at 325. Contrary to petitioner's assertion (Pet. 7), *Neitzke* did not purport to render its description of frivolous cases "definitive" or exhaustive. In fact, this Court observed that the term frivolous as used in the *in forma pauperis* statute is "indefinite," 490 U.S. at 325, and indicated that its meaning must be determined by reference to the congressional purpose in enacting the statutory provision at issue, namely, "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11," *id.* at 327. Similarly, when this Court subsequently addressed the dismissal of a different claim as frivolous under the *in forma pauperis* statute, it likewise did not hold that *Neitzke*'s characterization of frivolous claims was exhaustive. See *Denton*, 504 U.S. at 31 (*Neitzke* "provided us with *our*

[6] *Neitzke* addressed 28 U.S.C. 1915(d). That provision was modified and redesignated as 28 U.S.C. 1915(e) by the PLRA, which retained the relevant phrase "frivolous or malicious." See note 2, *supra*.

first occasion to construe the meaning of 'frivolous' under § 1915(d)") (emphasis added); *ibid.* (*Neitzke* was "concerned with the proper standard for determining frivolousness of legal conclusions").

The court of appeals followed *Neitzke*. It noted that consideration of the *de minimis* nature of a claim is relevant to the question of whether an indigent plaintiff is bringing the suit solely because of the availability of a public subsidy to pay the filing fee. Pet. App. 9a. Indeed, it is logical to conclude that *de minimis* claims are often screened out by financial considerations in paid cases. Because the court of appeals' conclusion that the *de minimis* value of a claim can be relevant in a frivolousness inquiry is consistent with this Court's statements regarding the purpose of *sua sponte* dismissal of frivolous suits, the decision below is consistent with *Neitzke*.

Nor does the court of appeals' decision conflict with *Denton*. There, this Court addressed the proper standard to apply in reviewing a district court's decision dismissing an *in forma pauperis* action on the ground that the factual allegations in the complaint were frivolous. This Court held that the Ninth Circuit erred in conducting *de novo* review rather than review for an abuse of discretion, because "frivolousness is a decision entrusted to the discretion of the court entertaining the *in forma pauperis* petition." *Denton*, 504 U.S. at 33. In so holding, this Court rejected application of a "monolithic standard" in determining whether factual allegations are frivolous. *Ibid.* The Court's emphasis on the discretion the *in forma pauperis* statute confers on district courts to dismiss frivolous claims refutes petitioner's assertion that the court of appeals' decision conflicts with *Denton*. Moreover, neither *Denton* nor

Neitzke purported to address the question whether the *de minimis* value of a claim may be a relevant factor in the determination of frivolousness under Section 1915(e)(2)(B)(i). Here, the court of appeals took into account the *de minimis* value of petitioner's claim along with other factors—including the lack of evidence that laundry staff had failed to follow standard procedures and the absence of any broader or ongoing interests of petitioner—in concluding that the complaint was properly dismissed. Pet. App. 11a-12a; see *id.* at 19a (FTCA claim denied administratively because, *inter alia*, signs were posted in the clothing exchange area stating that the facility was not responsible for lost or damaged clothing).

2. Petitioner does not allege that there is any circuit conflict on this issue. In fact, the only other court of appeals to have addressed the issue held that the *de minimis* value of a claim is relevant in determining whether the claim is frivolous under the *in forma pauperis* statute. In *Deutsch* v. *United States*, 67 F.3d 1080 (1995), the Third Circuit, after consulting dictionary definitions of the word "frivolous," *id.* at 1085-1086, concluded that a claim is "frivolous" under the *in forma pauperis* statute if it is: "(1) of little or no weight, value, or importance; (2) not worthy of serious consideration; or (3) trivial," *id.* at 1087. Applying that standard, the Third Circuit held that a claim for $4.20 worth of missing pens, where the plaintiff prisoner did not assert any meaningful interest in the case beyond that monetary interest, was frivolous. *Id.* at 1091-1092.

Petitioner implies (Pet. 5 n.1) that *Deutsch* is irrelevant because it was decided before the enactment of the PLRA. But, as the court below pointed out, the PLRA was "designed to strengthen, not vitiate, the role

of district courts" in screening out frivolous claims. Pet. App. 7a. Indeed, whereas prior law merely permitted dismissal of suits deemed to be frivolous, the PLRA "*requires* dismissal in similar circumstances." *Id.* at 6a (emphasis added). Petitioner contends (Pet. 5 n.1, 11-12) that the PLRA addressed the concern regarding claims of *de minimis* value by imposing the filing fee on *in forma pauperis* plaintiffs. See 28 U.S.C. 1915(b). But "the introduction of a deferred payment mechanism [should not] be mistaken for an implied congressional intention that this mechanism would be a panacea for excessive in forma pauperis litigation" or an intention to "negate[] th[e] discretion" district courts have long had "to dismiss frivolous complaints under § 1915." Pet. App. 7a.

3. Further review is unwarranted for the additional reason that petitioner cannot obtain meaningful relief from this Court. The court of appeals made clear that the dismissal is without prejudice and that petitioner "remains free to file a paid complaint with these same allegations." Pet. App. 13a; cf. *Denton*, 504 U.S. at 34 (holding that because a dismissal for frivolousness under the *in forma pauperis* statute "is not a dismissal on the merits, but rather an exercise of the court's discretion * * * , the dismissal does not prejudice the filing of a paid complaint making the same allegations"). Thus, the only question raised by the petition is whether petitioner is entitled to maintain his complaint *without pre-payment of the full filing fee*. That question must be answered in the negative, for reasons wholly unrelated to whether the complaint is frivolous. Specifically, under 28 U.S.C. 1915(g), petitioner cannot maintain an action without full prepayment of the filing fee because he "has, on 3 or more prior occasions, while incarcerated

or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. 1915(g).

This Court may take judicial notice[7] of the fact that petitioner has at least 3 dismissals for the reasons stated in Section 1915(g). See *Nagy* v. *Schaefer*, 46 Fed. Appx. 166, 167 (4th Cir. 2002) (unpublished) (per curiam) (dismissing appeal because it "is frivolous"); *Nagy* v. *United States*, No. 99-2578 (2d Cir. June 22, 2000) (denying motion to reinstate appeal and stating that "the appeal lacks an arguable basis in fact or law"); *Nagy* v. *Sweet*, No. 99-0065 (2d Cir. Feb. 25, 2000) (dismissing appeal for "lacking any basis in law" and citing 28 U.S.C. 1915(e)(2)); *Nagy* v. *Goldstein*, No. 98-2501(L), 1999 WL 357840, at *1 (2d Cir. May 20, 1999) (unpublished) (affirming dismissal of consolidated complaint on ground that claims "lack an arguable basis in law or fact"), cert. denied, 528 U.S. 1195 (2000). Because petitioner has previously filed at least three actions or appeals deemed by the courts to have been frivolous or to have failed to state a claim, and because the alleged loss of his sweat suit does not place him "under imminent danger of

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[7] See *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982) (per curiam) (noting that under the predecessor to 28 U.S.C. 1915(e)(2), federal courts had broad discretion to take judicial notice of other civil actions); *Iwachiw* v. *New York State Dep't of Motor Vehicles*, 396 F.3d 525, 529 (2d Cir. 2005) (taking judicial notice of prior frivolous appeals); *Green* v. *Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (taking judicial notice of "actions or appeals in courts of the United States dismissed as frivolous or malicious").

serious physical injury," 28 U.S.C. 1915(g), the PLRA precludes him from proceeding *in forma pauperis*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PAUL NAGY,

Petitioner,

v.

FMC BUTNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. Section 1915(g) Provides No Basis For Denial Of The Petition	1
II. The Court Of Appeals' Definition Of "Frivolous" Improperly Focuses On The Size Of The Claim	5
III. The Prison Litigation Reform Act Supplied The Economic Disincentive To Suit Without Barring Small Monetary Claims	7

TABLE OF CITED AUTHORITIES

Page

CASES

Andrews v. V.R. King,
398 F.3d 1113 (9th Cir. 2005) 2, 4

Boag v. MacDougall,
454 U.S. 364 (1982) 4

Denton v. Hernandez,
504 U.S. 25 (1992) 6, 7

Deutsch v. United States,
67 F.3d 1080 (3d Cir. 1995) 6, 7, 8

Evans v. Ill. Dept. of Corr.,
150 F.3d 810 (7th Cir. 1998) 3, 4

Garcia v. Silbert,
141 F.3d 1415 (10th Cir. 1998) 2

Koch v. Schuylkill County Prison,
94 F. Supp. 2d 557 (M.D. Pa. 2000) 3

McDowell v. Del. State Police,
88 F.3d 188 (3d Cir. 1996) 2

Neitzke v. Williams,
490 U.S. 319 (1989) 6, 7

Perez v. Wis. Dept. of Corr.,
182 F.3d 532 (7th Cir. 1999) 2

Cited Authorities

Page

Pigg v. FBI,
106 F.3d 1497 (10th Cir. 1997) 2

Roller v. Gunn,
107 F.3d 227 (4th Cir. 1997) 8

Snider v. Melindez,
199 F.3d 108 (2d Cir. 1999) 3

Wyatt v. Terhune,
315 F.3d 1108 (9th Cir. 2003) 2

STATUTES

28 U.S.C. § 1915(e)(2) 1

28 U.S.C. § 1915(g) 1, 2, 3, 4, 5

42 U.S.C. § 1983 3

42 U.S.C. § 1997e(a) 2

Prison Litigation Reform Act of 1995,
Pub. L. No. 104-134 2

Petitioner Paul Nagy files this Reply Brief in further support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (the "Petition"), and in response to the brief of Respondent FMC Butner opposing the Petition (the "Respondent's Opposition").

I. SECTION 1915(g) PROVIDES NO BASIS FOR DENIAL OF THE PETITION

The Respondent argues that (i) Mr. Nagy already has accrued at least three dismissals, or "strikes," for reasons stated in 28 U.S.C. § 1915(g) and that (ii) this Court should take judicial notice of this and deny the Petition on that basis. The Respondent argues that even if this Court were to reverse the Court of Appeals, an action that ultimately would result in the remand of Mr. Nagy's case to the District Court, the District Court would then take notice of Mr. Nagy's prior "three strikes" and dismiss the case. Thus, according to Respondent, "petitioner cannot obtain meaningful relief from this Court." Resp't Opp'n at 10.

Respondent should not be permitted to raise this new argument. Respondent could have made this argument in the Court of Appeals, but did not. Instead, Respondent fully litigated in that court only the question whether small claims having arguable legal and factual merit are nevertheless "frivolous" under 28 U.S.C. § 1915(e)(2). Having obtained victory below, the Respondent, with its newly asserted position, now would block Mr. Nagy's opportunity for further review of the Fourth Circuit's decision in this Court.

Respondent has cited no case or other authority supporting this tactic.

Section 1915(g), upon which Respondent's argument relies, is not jurisdictional. *See Pigg v. FBI*, 106 F.3d 1497, 1497 (10th Cir. 1997) ("Section 1915(g) is not a jurisdictional limitation but merely requires the full prepayment of fees where the conditions of the statute are met."); *Garcia v. Silbert*, 141 F.3d 1415, 1417 n.1 (10th Cir. 1998) (quoting *Pigg*); *McDowell v. Del. State Police*, 88 F.3d 188, 191 (3d Cir. 1996) (payment of filing fee is not jurisdictional). The provision's language regarding "three strikes" as a bar to further *in forma pauperis* litigation is pellucid, but other mandatory language in the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 ("PLRA") – namely, the requirement that a prisoner exhaust his administrative remedies before filing suit, 42 U.S.C. § 1997e(a) – is subject to waiver. *See Perez v. Wis. Dept. of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) ("Defendants may waive or forfeit reliance on § 1997e(a), just as they may waive or forfeit the benefit of a statute of limitations."); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (PLRA's exhaustion requirement creates an affirmative defense that must be raised and proved by the defendant); *see also Andrews v. V.R. King*, 398 F.3d 1113, 1119-20 (9th Cir. 2005) (analogizing § 1915(g) to the PLRA's exhaustion requirement, and concluding that in both instances the Government has burden of establishing that plaintiff should not be allowed to proceed with his *in forma pauperis* suit). Here, Respondent has waived its reliance on Section 1915(g) by not raising it below. If the case ends now, with no review of the merits of the Court of Appeals' mistaken ruling, the Respondent will have been rewarded for withholding its assertion of its Section 1915(g) defense until after winning the first appellate round.

This Court should not dispose of Mr. Nagy's Petition on Section 1915(g) grounds for the additional reason that the District Court is better positioned to determine whether that provision applies and to afford Mr. Nagy his procedural rights. Courts in several circuits have stated that provision of detailed notice is essential to a determination that Section 1915(g) applies to previous dismissals. *See Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999) ("The entry of a strike was obviously harmful to Snider's interests, yet he was given no notice and opportunity to be heard as to why, even if the dismissal was warranted, a strike might not be. Snider was entitled to such notice and opportunity in relation to the strike determination. . . ."); *Evans v. Ill. Dept. of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998) (prisoner must be placed "on notice as to what the district court considered when denying his request to proceed *in forma pauperis*" and given "an adequate opportunity to contest the district court's three-strike determination"); *Andrews*, 398 F.3d at 1120 (prisoner should be "placed on notice of the potential disqualification under § 1915(g) by either the district court or the defendant"); *Koch v. Schuylkill County Prison*, 94 F. Supp. 2d 557, 565 (M.D. Pa. 2000) (prisoner is entitled to notice before his petition for a writ of habeas corpus is recharacterized as a complaint under 42 U.S.C. § 1983, as he thereby "risks suffering a 'strike' under the 'three strikes' provision governing prisoner litigation").

The Second Circuit has emphasized that "providing the adversely affected party with notice and an opportunity to be heard plays an important role in establishing the fairness and reliability of the order" denying *in forma pauperis* status. *Snider*, 199 F.3d at 113. Until such an opportunity is provided, it cannot accurately be predicted that Mr. Nagy inevitably will be barred from proceeding with his suit under Section

1915. The fact that the district court did not so much as mention Section 1915(g) may at least raise some doubt about the question.

In addition to providing detailed notice, a court must base its conclusion that Section 1915(g) applies to bar an *in forma pauperis* claim upon a careful review of the plaintiff's previously dismissed cases. *See Evans*, 150 F.3d at 812 ("[I]n the order denying leave to proceed *in forma pauperis* the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions."); *Andrews*, 398 F.3d at 1121 ("[Section] 1915(g) should be used to deny a prisoner's *IFP* status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim.").

The preference that district courts decide such matters in the first instance was expressed in *Boag v. MacDougall*, 454 U.S. 364 (1982) (per curiam), a case cited by Respondent in its Opposition. *See* Resp't Opp'n at 11 n.7. This Court in *Boag*, while recognizing its power to do so, declined to take judicial notice of previously filed actions that were not disclosed in the record. The Court stated, "[I]t does not appear from the papers before us that any such discretion [to take judicial notice of the actions] was exercised by *either the Court of Appeals or the District Court*." *Boag*, 454 U.S. at 365 n.* (emphasis added). Because it was "in no position to decide" whether the petitioner's "prior filings justify the conclusion that his action is frivolous or malicious," the Court concluded that a "question of that character must be addressed in the first instance by the District Court," and accordingly remanded the action for further proceedings. *Id.*

In sum, Section 1915(g) is not a compelling grounds for denial of Mr. Nagy's Petition. However, if the Supreme Court were to disagree with Mr. Nagy on this point, it is respectfully suggested that the proper outcome for the administration of justice would be to vacate the opinion of the Court of Appeals and remand the case to the District Court for the determination whether Section 1915(g) would bar Mr. Nagy's claim rather than allowing an appellate opinion to stand that, on the Respondent's new reasoning, should not have been delivered in the first place.

II. THE COURT OF APPEALS' DEFINITION OF "FRIVOLOUS" IMPROPERLY FOCUSES ON THE SIZE OF THE CLAIM

Respondent's Opposition fails to acknowledge that the result of the Fourth Circuit's test will be to almost certainly doom prisoner property claims. For all the discussion in the Opposition and in the Court of Appeals' decision about a "multi-factor test," the fact remains that the *only* factor that the District Court considered in this case was the size of Mr. Nagy's claim. It was nothing more than speculation for the Court of Appeals to divine what other matters may have been within the mind of the District Court when dismissing Mr. Nagy's claim, and now the Respondent endorses this exercise in speculation. Resp't Opp'n at 9.

The Respondent asserts that the Court of Appeals considered not only the small size of the claim, but also "other factors – including the lack of evidence that laundry staff had failed to follow standard procedures." *Id.* However, any reliance on the state of the evidence is completely misplaced, as the case was dismissed before any discovery commenced, indeed, before responsive pleadings were filed.

Mr. Nagy had no opportunity to adduce *evidence* that the laundry staff had failed to follow procedures, much less litigate the efficacy of any such procedures. Yet the Court of Appeals and Respondent cite the absence of that evidentiary record, in combination with the size of his claim, as practically decisive in justifying dismissal of his lawsuit. In reality, however, the District Court relied only upon the small size of his claim, citing the case of *Deutsch v. United States*, 67 F.3d 1080 (3d Cir. 1995), in which small claims are presumptively frivolous.

As can be seen from its first application in the Court of Appeals' opinion, the so-called "multi-factor" test is a chimera. It quickly reduces into a dominating focus on the size of the claim. Facing a small claim, courts will all too easily posit the existence of other factors supporting dismissal, even in the absence of evidence bearing upon them. In application, the new test for whether a prisoner's claim is "frivolous" will simply mean that small, meritorious claims are barred from federal court. And because prisoners do not have substantial property in prison, all, or virtually all, of their property claims will be small, meaning that under the Court of Appeals' test, prisoner property claims will no longer be heard in federal court. This policy choice, if it is to be made at all, should be made in the legislative branch, not by the courts.

In this connection, it is worth observing that, contrary to Respondent's characterization, Mr. Nagy does not argue that this Court's decisions in *Neitzke v. Williams*, 490 U.S. 319 (1989), and *Denton v. Hernandez*, 504 U.S. 25 (1992), "purport[ed] to render its description of frivolous cases 'definitive' or exhaustive." Resp't Opp'n at 7. This Court obviously can further elaborate on the definition of

"frivolous," and lower courts are free to do so as well, provided that they do so within the confines of this Court's doctrine. However, under the Court of Appeals' new test, Mr. Nagy's claim is "frivolous," even though there is no dispute that it is factually plausible and has a basis in law. It is not possible to square that outcome with this Court's holdings in *Neitzke* and *Denton.*

III. THE PRISON LITIGATION REFORM ACT SUPPLIED THE ECONOMIC DISINCENTIVE TO SUIT WITHOUT BARRING SMALL MONETARY CLAIMS

The Respondent's Opposition emphasizes the abstract principle that the PLRA was designed to make it more difficult for prisoners to sue. But this general purpose, indisputable though it may be, does not mean that *any* test developed by the courts to block prisoner litigation is therefore permissible. The word "frivolous" in that statute must be interpreted in the context of the statute itself and consistently with this Court's precedents.

As discussed in the Petition, prior to the PLRA two strands of thought developed as to how best to address burgeoning *in forma pauperis* prisoner litigation. First, there was the approach of the *Deutsch* court, in which the size of the claim in relation to the filing fee became the predominating consideration. Where the claim was smaller than the filing fee, the claim would be presumed to be frivolous. On the other hand, suggestions were made that the solution to *in forma pauperis* litigation, which lacked the restraining counterbalance of a filing fee, would be to simply require prisoners to pay the filing fee.

Faced with these alternative solutions, Congress elected in the PLRA to require *in forma pauperis* prisoner litigants to pay the filing fee over time. Thus, after the PLRA, the prisoner always is assessed the filing fee. Congress could easily have opted for the *Deutsch* approach, but it did not.

In choosing as it did, Congress considered "that the proliferation of prisoner litigation was due significantly to the lack of economic disincentives to filing meritless cases." *Roller v. Gunn*, 107 F.3d 227, 230-31 (4th Cir. 1997). The requirement that prisoners qualifying for *in forma pauperis* status pay the entire filing fee – albeit on a deferred basis – was designed to "[r]equir[e] prisoners to make economic decisions about filing lawsuits. . . . If a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, he has demonstrated an implied evaluation of that suit that the courts should be entitled to honor." *Id.* at 233 (quotation omitted). In other words, the PLRA "simply force[s] the prisoner to weigh whether the 'merit of the claim' was worth 'the cost of pursuing it.'" *Id.* at 232. Thus, the PLRA imposed the financial incentive designed to discourage small-stakes claims. Yet, conspicuous by its absence in the PLRA is any minimum claim amount requirement. Congress did not, in the PLRA, alter the Supreme Court's definition of "frivolous" or in any other way suggest that a "minimum amount in controversy" requirement existed within either the *in forma pauperis* statute or in the PLRA itself.

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For the foregoing reasons, in addition to those in the Petition, Mr. Nagy respectfully requests that this Court grant the Petition.

Respectfully submitted,

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